Supreme Court, U.S.
FILED

061304 MAR 27 2007

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

ALPHA TELECOMMUNICATIONS, INC., PETITIONER

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Nathaniel Hawthorne
27600 Chagrin Boulevard
Suite 265
Cleveland, OH 44122
(216) 514-3336

Dennis P. Derrick
Counsel of Record
Seven Winthrop St
Essex, MA 01929
(978) 768-6610

Attorneys for Petitioner

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 393-4141 ♦ USSCINFO.COM

QUESTIONS PRESENTED

1. Did the court of appeals violate the Supremacy Clause when despite the controlling force of the FCC's order extending the time for performing and funding the parties' contract to provide telecommunication and internet services to school districts, it relied upon state contract law to conclude that the contract between the parties had expired well before any extension ordered by the FCC?

2. Has the decision below which relies on state law instead of federal regulatory law to determine the length of the parties's contract under the Telecommunications Act undermined Congress' intent in passing the Act, diminished the FCC's role in administering the Act, discouraged small business contractors from partnering with major suppliers and inhibited free and open competition to provide schools and libraries with discounts for telecommunication and internet services?

3. Is it in the public interest to allow a major supplier of telecommunications and internet services under the Act to evade payment to its subcontractor by claiming that its contract with the subcontractor had terminated under State law even after it had sought and obtained from the FCC an extension for performing this very contract while letting the subcontractor continue to provide it with 90% of the contract work until the FCC rendered its decision?

RULE 29.6

Petitioner has no parent company. No publicly held company owns 10% or more of petitioner's stock.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

RULE 29.6 iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

RELEVANT PROVISIONS INVOLVED 2

STATEMENT 2

REASONS FOR GRANTING THE PETITION 14

CONCLUSION 23

APPENDIX

Circuit Court Opinion 1a

District Court Decision 20a

Order Denying Rehearing 33a

Pratt Affidavit 34a

Relevant Provisions Involved 38a

TABLE OF AUTHORITIES

CASES

AMERICAN AIRLINES, INC. v. WOLENS, 513 U.S. 219.....20

AT&T CORP. v. IOWA UTILITIES BOARD, 525 U.S. 366, 371-373(1999).....*passim*

BARNETT BANK, N.A. v. NELSON, 517 U.S. 25, 31(1996).....15

CALIFORNIA COMM'N v. UNITED STATES, 355 U.S. 534, 540-544(1958).....19

CHICAGO & N.W. TR. CO. v. KALO BRICK & TILE CO., 450 U.S. 311, 317-318, 327(1981).....20

CIPOLLONE v. LIGGETT GROUP, INC., 505 U.S. 504, 521, 548-549(1992).....14

CITY OF NEW YORK v. FCC, 486 U.S. 57, 64(1988).....14

CROSBY v. NAT'L FOREIGN TRADE COUNCIL, 530 U.S. 363, 372-373(2000).....15

FLORIDA LIME & AVOCADO GROWERS, INC. v. PAUL, 373 U.S. 132. 143(1963).....15

FRANCHISE TAX BOARD OF CAL. v. CONSTRUCTION LABORERS VACATION TRUST FOR SOUTHERN CAL., 463 U.S. 1, 23(1983).....19

GEIER v. AM. HONDA MOTOR CO., 529 U.S. 861, 881, 885 (2000).....16

GUARANTY TRUST CO. OF NEW YORK v. YORK, 326 U.S. 99, 108-109(1945).....22

HINES v. DAVIDOWITZ, 312 U.S.52, 66-67(1941)..... 15

INTERNATIONAL ASSOCIATION OF MACHINISTS v. CENTRAL AIRLINES, INC., 372 U.S. 682, 690-691(1963) 20, 22

JONES v. RATH PACKING CO., 430 U.S. 519, 525, 530-531(1977) 15

LA. PUB. SERV. COMM'N v. FCC, 476 U.S. 355, 368(1986) 14, 17, 21

MARYLAND v. LOUISIANA, 451 U.S. 725, 746(1981)..... 15

MCCULLOCH v. MARYLAND, 17 U.S. (4 WHEAT.)316, 427 (1819)..... 15

MEDTRONIC, INC. v. LOHR, 518 U.S. 470, 503-504(1996) 14, 15

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. v. DABIT, 547 U.S. ___,___(2006) 14

METROPOLITAN LIFE INS. CO. v. TAYLOR, 481 U.S. 58, 64(1987)..... 22

NATIONAL CABLE & TELECOMMUNICATIONS ASSN. v. BRAND X INTERNET SERVICES, 545 U.S. 967, 980-981(2005) 17

PACIFIC GAS & ELEC. v. ENERGY RESOURCES COMM'N, 461 U.S. 190, 220-221(1983..... 15

RICE v. SANTA FE ELEVATOR CORP., 331 U.S. 218, 230(1947) 14, 15

SHAW v. DELTA AIRLINES, INC., 463 U.S. 85, 95-96(1983) 15

TRANSAMERICA MORTGAGE ADVISORS, INC. v. LEWIS, 444 U.S. 11 22

U.S. v. ALLEGHENY COUNTY, 322 U.S. 174, 183(1944) 19

VERIZON COMMUNICATIONS INC. v. LAW OFFICES OF CURTIS & TRINKO, LLP, 540 U.S. 398, 412-413(2004) 17

XEROX CORP. v. COUNTY OF HARRIS, 459 U.S. 145, 151-153(1982) 19

STATUTES

28 U.S.C. SECTION 1254(1) 2

28 U.S.C. SECTION 2101(C) 2

47 U.S.C. SECTION 253(A) 18

47 U.S.C. SECTION 160(A) 5

47 U.S.C. SECTION 254(B)(6) 5

47 U.S.C. SECTION 254(H)(1)(B). 47 4

47 U.S.C. SECTION 254(H)(2)(A) 3

RULES

FED. R. CIV. P. 11 9

REGULATIONS

47 CFR SECTION 54.507(G) 4

47 CFR SECTIONS 54.504(A) 4

47 CFR SECTIONS 54.504(B) 4

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Sixth Circuit in *Alpha Telecommunications, Inc. v. International Business Machines Corporation*, C.A. Nos. 05-3974 and 05-4022, decided September 8, 2006, affirming the order of the District Court *sua sponte* granting summary judgment in favor of the respondent in this contract action brought by the petitioner, is set forth in the Appendix hereto(App. 1-19).

The unpublished decision of the District Court for the Northern District of Ohio, Eastern Division, in *Alpha Telecommunications, Inc. v. International Business Machines Corporation*, Docket No. 1:04 CV 489, filed July 8, 2005, *sua sponte* granting summary judgment in favor of the respondent in this contract action brought by the petitioner, is set forth in the Appendix hereto(App. 20-32).

The unpublished opinion of the United States Court of Appeals for the Sixth Circuit in *Alpha Telecommunications, Inc. v. International Business Machines Corporation*, C.A. Nos. 05-3974 and 05-4022, decided December 27, 2006, denying the petitioner's combined petition for rehearing or for rehearing *en banc*, is set forth in the Appendix hereto(App. 33).

The Affidavit of Michael J. Pratt in support of the respondent's motion for sanctions, is set forth in the Appendix hereto(App. 34-37).

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit affirming the decision of the District Court which *sua sponte* granted summary judgment to the respondent in this action brought by the petitioner for breach of contract, was entered on September 8, 2006; and its further order denying the petitioner's timely filed combined petition for panel rehearing or for rehearing *en banc* was filed and decided on December 27, 2006(App. 1-19;33).

This petition for writ of certiorari is filed within ninety (90) days of December 27, 2006. 28 U.S.C. Section 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1).

RELEVANT PROVISIONS INVOLVED(see appendix)

STATEMENT

In the wake of the court-ordered breakup of AT&T in 1984 and the ensuing explosion in telecommunications including wireless and the internet, the Telecommunications Act of 1996 became law. The first major restructuring of the telecommunications sector since 1934, its preamble reflected Congress' intent "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunication technologies." The Act outlaws artificial regulatory barriers to entry in local exchange

markets; and it mandates interconnection of telecommunications networks, unbundling, non-discrimination and cost-based pricing of leased parts of the network so that competitors can enter and compete component by component as well as service by service. See generally, *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 371-373(1999).

The Act also changed how the Public Switched Telecommunications Network or the "Universal Service" for telecommunications access nationwide was subsidized in order to promote competition and minimize the unequal treatment of service providers. The Act empowered the Federal Communications Commissions ("the FCC"), to insure through its rulemaking that funding for Universal Service was achieved in an efficient and competitively neutral way. To this end, 47 U.S.C. Section 254(h)(2)(A), directs the FCC to establish "competitively neutral rules" to enhance and promote access to advanced telecommunications and information services for all public and nonprofit elementary and secondary school classrooms and libraries. Under Section 254(h)(2)(B), it can make rules to "define the circumstances under which a telecommunications carrier may be required to connect its network to such public institutional telecommunications users."

Both the Act and the FCC in its regulations provide that under the schools and libraries Universal Service support mechanism----also known as the E-rate program----eligible schools, libraries and any consortia of same may apply for discounts for telecommunications services, internet access and internal connections from telecommunication carriers "at rates less than the

amounts charged for similar services to other parties...." 47 U.S.C. Section 254(h)(1)(B). 47 CFR Sections 54.502; 54.503.

In order to encourage competitive bidding among telecommunication carriers in this process, the FCC's regulations mandate that a school or library first submit FCC Form 470 to the Universal Service Administrative Company, the FCC's own program administrator("the Administrator"), certifying to a technology plan which justifies the telecommunication services being sought and describes those services in sufficient detail to enable potential providers to formulate bids. 47 CFR Sections 54.504(a) and (b). The Administrator then posts FCC Form 470 on the web site maintained by its Schools and Libraries Division ("SLD") for review by all the service providers who then submit competitive bids. *Id.* Under the rules, the applicants must accept the most cost-effective bid.

After giving the service providers four weeks to submit their bids, the applicant may enter into a contract with the chosen provider, submitting a completed FCC Form 471 application to the Administrator, indicating the selected service provider and the services for which discounts are sought.47 CFR Sections 54.504(b) and (c). SLD then reviews the FCC Form 471 and issues funding commitments on the SLD's web site in accordance with the FCC's rules. Applications which are received outside of this filing window are subject to separate funding priorities under the FCC's rules and typically do *not* receive funding. 47 CFR Section 54.507(g).

However, in exercising its mandate under 47

U.S.C. Section 254(b)(6), to enhance access to advanced telecommunications and information services for all public and non-profit elementary and secondary school classrooms...and libraries," the FCC on occasion has seen fit to waive a rigid adherence to the Administrator's procedures or funding time lines when they do not further the purposes of Section 254(b) or do not serve the public interest.

Especially where there is no evidence of fraud, waste, or misuse of funds, the FCC has on its own motion waived strict compliance with its funding rules or time lines where it would impose undue hardship, inequitable results or prevent schools and libraries from receiving the E-rate funding which they otherwise should have. See, e.g., *Request for Review of the Decision of the Universal Service Administrator by Alaska Gateway School District*, CC Docket No. 02-6(9/14/06); *Request for Review of the Decision of the Universal Service Administrator by Academia Claret, Puerto Rico*, CC Docket No. 02-6(9/21/06); *Request for Review of the Decision of the Universal Service Administrator by Bishop Perry Middle School, New Orleans, LA*, CC Docket No. 02-6(5/19/06). See generally 47 U.S.C. Section 160(a) and (b).

With these facts as background, on May 25, 1999, the petitioner and the respondent entered into a Customer Solutions Agreement ("CSA") whereby the petitioner would provide the respondent with certain deliverables and services as described in Statements of Work or SOWs which were contemplated by the parties to be issued under the CSA. Among other things, the CSA provided that either party could terminate the CSA upon a material breach by the other party or when

one of them seeks bankruptcy; or without cause when there were no outstanding SOWs in progress. However, in the event that there was an SOW in progress and the respondent terminates the CSA *with* cause, the petitioner was entitled to payment for all deliverables up to the time of termination at the agreed upon price. If the termination was *without* cause, the respondent was bound to "compensate [the petitioner] for the actual and reasonable expenses incurred by [the petitioner] for work in process up to and including the date of termination provided [petitioner] uses reasonable efforts to mitigate [respondent]'s liability under this Subsection...."

One of the SOWs which the parties expressly contemplated in the 1999 CSA—in fact, it has the identical Agreement Number (4999CSO442) as the CSA itself----is the SOW they executed on January 2, 2002. There the petitioner, a company experienced in telecommunications regulation, federal funding rules and contract requirements, agreed for compensation to provide the respondent with advice and assistance in offering to provide telecommunications services under the 1996 Act to school districts in the Western and Southwestern Regions.

The petitioner was to furnish this assistance "throughout the project" and the Project Year was to run from July 1, 2002, to June 30, 2003. However, in view of the fact that funding commitments by the SLD might not be timely for the identified Project Year, the SOW itself qualified this Project Year timetable with an "Estimated Schedule" for the petitioner's performance as starting on December 1, 2001, and terminating December 1, 2003. In addition, a key

assumption expressly made the SOW "contingent on funding confirmation from the...SLD...[and [f]unding confirmation shall occur when the SLD posts funding of the SLD web site."

The petitioner began work under the SOW in January of 2002. In January of 2003, the SLD denied funding for some of the respondent's contracts worth $250,977, 707.08 with various schools because of the schools' failure to specify properly in the bidding process what services they were requesting. On January 30, 2003, seven school districts appealed to the FCC these decisions by the SLD denying E-rate funding of Universal Service for Funding Year 2002. The respondent also appealed, requesting review of these decisions denying funding by the SLD. See *Request for Review of the Decision of the Universal Service Administrator by International Business Machines, Inc., on behalf of Ysleta Independent School District*, CC Docket Nos. 96-45 and 97-21(filed January 30, 2003)("IBM Request for Review").

On December 8, 2003, the FCC issued an opinion finding that while the missteps were not consistent with its rules, it would waive the filing requirements for Funding Year 2002. Consistent with its prior rulings which had excused strict compliance with its funding rules or time lines, it found good cause in the "unique" circumstances here to direct the Administrator to "reopen the filing window for Funding Year 2002" for these seven school districts *as well as for the respondent.* The FCC directed that FCC Form 470 be submitted to the Administrator by February 6, 2004, and that after a contract was signed with a service provider, FCC Form 471 was to be filed on or before

April 23, 2004. As the FCC expressly ruled, "[n]othing in this Order prevents IBM from submitting new bids for services" for these school districts.

On February 25, 2004, however, the respondent told the petitioner to stop working on the SOW even though the E-rate year for this SOW had not yet concluded and despite the fact that the window for this funding year and this SOW remained open until April 23, 2004. The respondent told the petitioner that it would not use the petitioner in any re-bid process since the SOW "had expired" and was "not renewed." The petitioner responded by contending that it had completed 90% of the work under the SOW; that the E-rate year for this SOW had not yet expired and that the respondent's unilateral termination before the E-rate year had occurred for funding purposes breached the CSA and the SOW without cause entitling the petitioner to damages under the CSA.

With no payment forthcoming from the respondent for the work it had performed under the CSA and the SOW, the petitioner brought this civil action against the respondent in federal district court for the Northern District of Ohio positing jurisdiction on diversity of citizenship and seeking damages of $16,135,053.97 for breach of contract or, alternatively, for the fair value of the work it performed pursuant to the SOW before the respondent had wrongfully terminated the SOW. Alleging that it had performed 90% of the work due under the SOW and was ready to perform the remaining 10% before the respondent breached the agreement by terminating it, the petitioner claimed that the respondent's actions breached the duty of good faith and fair dealing implied

in both the CSA and the SOW. The respondent's answer denied liability and asserted *inter alia* that it had properly terminated the CSA and the SOW with cause.

With the pleadings in this posture, the petitioner moved for summary judgment in its favor contending that regardless of whether the respondent terminated the SOW with or without cause, it was bound by the terms of the CSA to compensate the petitioner for the work it had performed under the SOW up to the time it terminated the SOW contract, i.e., from January of 2002 to February 25, 2004. Besides opposing this motion, the respondent moved for sanctions against the petitioner under Fed. R. Civ. P. 11.

On July 8, 2005, the federal district judge issued a memorandum of decision denying the petitioner's summary judgment motion, *sua sponte* granting summary judgment for the respondent and denying the respondent's motion for sanctions(App. 20-32). While the district judge adverted briefly to the CSA as one of the contracts governing the parties' conduct in the circumstances, it focused on one of the three "key assumptions" of the SOW itself, i.e., that the SOW was "contingent on funding confirmation from the...SLD....[which] shall occur when the SLD posts funding on the SLD web site"(App.21-22).

Applying Ohio contract law to determine the substantive rights of the parties in this diversity action, the federal district court ruled that while the petitioner had proven an express contract, it had not proven by a preponderance of the evidence that the condition precedent about the SLD posting funding of these

contracts had been fulfilled(App. 27). Accordingly, it had failed to show a right to recover any damages on account of the respondent's breach(App.26-28). As the district court concluded,

> [i]n this instance, Key Assumption #2, detailed in the 7 January 2002 SOW, clearly operates as condition precedent to [petitioner's] recovery. [It] offers no evidence to show that [the respondent] has received federal E-rate funding, instead adopting the position that this "key" assumption is, in fact, irrelevant.

(App. 27)(footnote omitted).

The federal district court reached this conclusion despite the fact that the FCC's decision of December 8, 2003, *extended* the E-rate year or the Project year for purposes of this SOW and therefore kept open the funding window for this SOW until April 23, 2004, a funding opportunity the respondent expressly repudiated on February 25, 2004, when it unilaterally decided to terminate the SOW(App. 28).

Summary judgment therefore entered in the respondent's favor on Count I(App. 28). Because there was an express contract between the parties, the petitioner could not recover in *quantum meruit* under Count II(App. 28-29). Finally, the respondent's motion for sanctions against the petitioner was denied(App. 29-30).

The petitioner appealed and a majority of the court of appeals affirmed the district court but for different reasons(App. 1-19). It disagreed with the

district judge that the petitioner had not proved damages; however, it determined that summary judgment for the respondent was nonetheless proper since the petitioner had "failed to establish that [the respondent] had breached the contract in question"(App. 9). Applying Ohio contract law, it first ruled that the petitioner's right to damages in the event of a breach by the respondent was governed by the language of the CSA (detailing termination with and without cause) rather than by the occurrence of a condition precedent that the respondent obtain funding from the SLD(App. 10-11). As the court of appeals put it, "[c]onditions precedent render a party's performance conditional; [they] do not grant a party the right to repudiate a contract prior to the occurrence of the condition"(App. 10).

However, it rejected the petitioner's claims that by extending the funding window for this SOW, the FCC's order of December 8, 2003, extended the Project Year under the SOW as well as the time for performance of the SOW and thus the SOW itself, making the respondent's without cause termination of the SOW on February 25, 2004, actionable under Section 3.3 of the parties' CSA(App. 11-14). The court determined instead that the respondent had not repudiated "the SOW in issue" because its terms, i.e., the "Estimated Schedule" recited in its Section 1.5, provide that the petitioner

> will perform services in this Statement of Work as required to meet customer requirements. For this Statement of Work the Start Date will be December 1, 2001, and the *Termination Date shall be December 1, 2003.*

(App. 12)(emphasis supplied).

Thus, according to the court of appeals, the terms of the SOW now overrode the FCC's order of December 8, 2003, *an order achieved as the result of the respondent's own appeal*, about how long the contract would last; and thus when the respondent notified the petitioner on February 25, 2004, to stop working under the SOW, the SOW had *already* expired by its own terms and the respondent "could not have repudiated or terminated the SOW"(App. 12).

In reaching this result, the court of appeals rejected as "meritless" the petitioner's argument that the FCC's decision of December 8, 2003, extended the E-rate year for this SOW and kept open the funding window for this SOW until April 23, 2004, extending the SOW's termination date by its very terms(App. 12-14). It saw no relationship between the FCC's extension of the SOW's Project Year for funding purposes and the termination date for a SOW whose work itself hinged on the same Project Year and, in fact, made funding for its work dependent on the extent of the Project Year:

> A project year is simply the year which a school's plan must cover, and for which time period the FCC will supply a school with funding. Its dates do not correspond with any agreement between [the petitioner] and [the respondent].
> ....[T]he SOW does not state that its termination date is based on the FCC's project year and [the petitioner] fails to explain why the dates of the project year would have any bearing on the

SOW's termination date.

(App. 13).

Nor did the majority of the court think that the SOW's heading in Section 1.5--- "*Estimated* Schedule" for the SOW's work--- changed the result(App. 14). Even "[a]ssuming that the December 1, 2003 was an 'estimate' and therefore subject to change, [the petitioner] has offered the Court no reason to believe the date was actually changed'"(App. 14).

Finally, the court of appeals affirmed the district judge's denial of the respondent's motion for sanctions finding no abuse of discretion(App. 14-16). In a separate concurring opinion, Circuit Judge Griffin would have affirmed the district court for the reasons relied upon by the district judge (App. 17-19).

On December 27, 2006, the court of appeals denied the petitioner's timely filed combined petition for panel rehearing or for rehearing *en banc*(App. 33). The petitioner has now brought to this Court its petition seeking a writ of certiorari to the Court of Appeals for the Sixth Circuit.

REASONS FOR GRANTING THE PETITION

The Decision Below Violates the Supremacy Clause By Allowing The Substantive Contract Law of Ohio To Control The Efficacy Of the Federal Protocol Established By the FCC Through Its Regulations And Decisions For Offering Schools and Libraries Telecommunication and Internet Services At Deeply Discounted Rates Under The Telecommunications Act.

The Supremacy Clause of Art. VI of the Constitution gives Congress the power to preempt state law. *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368(1986). "Preemption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may [also] preempt state regulation. *Id.* at 369. See also *City of New York v. FCC*, 486 U.S. 57, 64(1988)("[I]n proper circumstances, the agency may determine that its authority is exclusive and preempts any state efforts to regulate in the forbidden area."). Moreover, the "state regulations" preempted by federal regulations can include state common law damage actions based upon breach of contract or tort. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 503-504(1996). *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521, 548-549(1992).

Because the States are independent sovereigns in our federal system, *Medtronic*, 518 U.S. at 485, state laws are not preempted unless preemption is "the clear and manifest purpose of Congress."*Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230(1947). See *Merrill Lynch, Pierce, Fenner & Smith, Inc. v.* Dabit, 547 U.S. ___,___(2006). Thus preemption analysis considers

Congressional intent to be its "ultimate touchstone." *Medtronic*, 518 U.S. at 485. If such preemption is found, the state law requirements touching on the controversy are "without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746(1981) citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.)316, 427 (1819).

This Court has identified six situations where it can be reasonably inferred that Congress intended to preempt state statutory or regulatory law or other state common law requirements touching on a given controversy: (1) where Congress in enacting a federal statute is explicit in its intent to reserve federal supremacy over the subject matter and preempt state law, *Barnett Bank, N.A. v. Nelson*, 517 U.S. 25, 31(1996); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 530-531(1977); (2) when there is an outright or actual conflict between the federal and state law, even when Congress says nothing about it, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132. 143(1963); (3) where the conflict between federal and state law makes it physically impossible to comply with both sets of regulation, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-373(2000); (4) when the federal law implicitly carries with it a barrier to state regulation, *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 95-96(1983); (5) where the federal regulatory scheme is so pervasive and the federal interest so dominant that there is no room for state law regulation, *Rice v. Santa Fe Elevator Corp.*, *supra*; or (6) when the state law prevents the accomplishment of the objectives which Congress seeks in enacting the federal statute. *Pacific Gas & Elec. v. Energy Resources Comm'n*, 461 U.S. 190, 220-221(1983. *Hines v. Davidowitz*, 312 U.S.52, 66-67(1941).

Even though with federal agency regulations, "a court should not find preemption too readily in the absence of clear evidence of a conflict," *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 881, 885 (2000), Congress has laid out in the Telecommunications Act of 1996 a pervasive role for the FCC in administering the Act's provisions with respect to offering Universal Service to schools and libraries nationwide at deeply discounted rates. On several scores, the Act expressly and implicitly gives the FCC and the regulations it was entitled to promulgate pursuant thereto unquestioned preemptive power over any state law or state legal requirement to the contrary.

It was therefore a violation of the Supremacy Clause for the court of appeals to override the FCC's power to affect the parties' agreement about when the SOW was going to end and instead apply Ohio contract law in order to endow the SOW, specifically its language about an "estimated" termination date of December 1, 2003, with the power to control the FCC's order of December 8, 2003, one which extended the funding window for this SOW, extended the Project Year under this SOW, extended the time for the performance of this SOW and thus extended the SOW itself to April 23, 2004.

Properly read consistent with Congress' intent which gives priority to the FCC's regulatory order of December 8, 2003---an order which the respondent itself invoked by pursuing its appeal to the FCC---the SOW terminated on April 23, 2004, making the respondent's termination of the SOW on February 25, 2004, premature, without cause and therefore actionable under Section 3.3 of the parties' CSA. For

this reason, a writ of certiorari should issue to review and reverse the court of appeals' decision affirming the entry of summary judgment in favor of the respondent.

In the first place, "the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. at 374. Since 1938 when it amended the Communications Act of1934 by adding Section 201(b), Congress has given the FCC pervasive power to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of the Act." *AT&T v. Iowa Utilities Bd.*, 525 U.S. 366, 377-378 (1999).

The 1996 Act enhanced this pervasive grant of rulemaking authority to the FCC, giving it the power to make binding legal rules about the conduct of the telecommunications industry, both *interstate* and *intrastate*, making its regulatory power even more pervasive and designed to deter and remedy anti-competitive harm wherever it occurs among suppliers of telecommunications, information and internet services. *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 980-981(2005). *Verizon Communications Inc. v. Law Offices of Curtis & Trinko, LLP*, 540 U.S. 398, 412-413(2004). *AT&T v. Iowa Utilities Bd.*, 525 U.S. 366, 377-379 & nn.5 & 6. As this Court noted in *AT&T v. Iowa Utilities Bd.*, the Act took the regulation of local telephone service completely away from the states and established "a new *federal* regime" to promote competition. *Id.* at 378 n.6. Thus states can no longer

enforce laws that impede competition in any aspect of the Act, including the offering of telecommunication services to school districts. *Id.* at 525. In addition, the Act expressly prohibits state regulation of the Internet. 47 U.S.C. Section 230(b).

In the second place, beyond these pervasive grants by Congress to the FCC of rulemaking and superintendent authority in administering the 1996 Act, Congress expressly provides in the Act itself that the FCC's role in this endeavor is to be predominant and that the laws of the several States are *preempted* to the extent inconsistent with the Act or the FCC's authority thereunder. For example 47 U.S.C. Section 253(a), provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

In addition, subsection (d) of Section 253 gives the FCC the express power to preempt any state statute, regulation or other legal requirement which would be anti-competitive or at variance with Section 254's provisions concerning the bidding for Universal Service by *inter alia* school districts and libraries. In other words, the Act gives the several States the power to "preserve and advance Universal Service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers," *but no more--- and if any state acts beyond this limited grant, the FCC has the right to preempt such acts.* 47 U.S.C. Sections (a), (b) and (d). Consistent with this statutory grant of power to the FCC, this Court has noted where federal policy is

to encourage certain conduct, state law discouraging that conduct must be pre-empted. See *Xerox Corp. v. County of Harris*, 459 U.S. 145, 151-153(1982).

In the third place, Congress' pervasive grant of federal authority to the FCC over both the telecommunications industry and the process of competitive bidding for both interstate and intrastate Universal Service to schools and libraries is tantamount to a complete federal occupation of the field, implicitly preempting any state or local regulation inconsistent therewith pursuant to the Supremacy Clause. *California Comm'n v. United States*, 355 U.S. 534, 540-544(1958).*U.S. v. Allegheny County*, 322 U.S. 174, 183(1944). *A fortiori*,

> [t]he validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, *all present questions of federal law not controlled by the law of any State.*

U.S. v. Allegheny County, *supra* (citations omitted)(emphasis supplied).

Thus where federal law is so powerful as to displace entirely any state cause of action for breach of contract, any such suit is purely a question of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of federal law. *Franchise Tax Board of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 23(1983). *International Association of Machinists v. Central*

Airlines, Inc., 372 U.S. 682, 690-691(1963). The federal interest being paramount, the role of the States in this regime will always be subject to federal oversight. *AT&T v. Iowa Utilities Bd.*, 525 U.S. at 378 n.6.

In the fourth place, substantive Ohio contract law, to the extent that it allows a federal court to ignore the force of the FCC's order of December 8, 2003, in fixing the intent of the parties about when their SOW was to end, is preempted because this state law does not accommodate the FCC's extension of the SOW for missteps in the bidding process as well as for funding purposes, extensions which are a necessary part of the *federal* regime to provide deeply discounted Universal Service to schools and libraries. In this way, applying Ohio contract law to this controversy prevents the accomplishment of the objectives which Congress sought when it passed the 1996Act, i.e., to provide Universal Service to schools and libraries at deeply discounted rates; to fully fund this enterprise and thereby encourage small business contractors such as the petitioner to partner with major telecommunications suppliers such as the respondent; and to have free and open competition for telecommunication and internet services with price being the sole determinant. With Ohio contract law at cross purposes with the Act's intendment, it is preempted. *Chicago & N.W. Tr. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317-318, 327(1981). See and compare *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 232-233(1995)(preemption warranted where state law produces result which is different than the intent of the parties).

Accordingly, because the situation here matches

four of the six situations identified by this Court in *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. at 368-369 for preemption of state law by federal regulations, the federal courts below should have preempted Ohio contract law in determining the intent of the parties about when their SOW ended and should have given preeminent force to the FCC's order of December 8, 2003, an order which the respondent itself invoked by its appeal and one extending the time for the SOW's performance and funding to April 23, 2004. Thus under the *federal* regime intended by Congress, the SOW terminated on April 23, 2004, making the respondent's termination of the SOW on February 25, 2004, premature, without cause and therefore actionable under Section 3.3 of the parties' CSA.

Besides violating the Supremacy Clause, the court of appeals' decision to apply Ohio contract law in order to allow IBM to cancel the SOW prematurely without cause and without incurring liability to the petitioner subverts the protocol established by the FCC for offering to schools and libraries telecommunication and internet services at deeply discounted rates, a regulatory protocol which, as this Court held in *AT&T v. Iowa Utilities Bd.*, 525 U.S. at 378 n.6., the FCC has the right to implement under the Act. It also discourages small businesses like the petitioner from partnering with major telecommunications suppliers such as the respondent; and it is assuredly not in the public interest to allow a major supplier of telecommunications and internet services to evade payment to its subcontractor by claiming that the contract year had terminated under state law *after it had sought and obtained an extension of this very contract year from the FCC* while letting

the subcontractor continue to provide it with 90% of the contract work until the FCC rendered its decision.

For these reasons, federal common law rather than Ohio contract law applies to this controversy and this federal common law in defining the parties' agreement will take into account the force of the FCC's order of December 8, 2003, extending the time performing and funding the parties' SOW. A federal court sitting in diversity is an adjunct of the state courts and, as such, an action that cannot be maintained in state court cannot be maintained by a federal court. See *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 108-109(1945). However, complete preemption in effect allows a state law complaint such as petitioner's to be recharacterized as an action arising under federal law and justifies its retention in the federal system as though originally filed in federal court properly asserting federal jurisdiction. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 64(1987). See *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11,18-19(1979)(suits by private persons to enforce contracts contemplated by federal statutes may set forth federal claims); *Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 692(1963)(same).

A writ of certiorari should therefore issue to the court of appeals, ordering it to remand the matter to the district court incident to this retained federal jurisdiction for the entry of an order granting the petitioner's motion for summary judgment and setting the case down for a hearing for an assessment of damages due the petitioner as a result of the respondent's breach or based upon a recovery in *quantum meruit*.

CONCLUSION

For all of these reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Sixth Circuit and, ultimately, to vacate and reverse that judgment and remand the matter to the United States District Court for the Northern District of Ohio, Eastern Division, with instructions that the petitioner's motion for summary judgment be granted and that the matter be set down for a hearing concerning the damages due the petitioner either as the result of the respondent's breach of contract or based upon a recovery in *quantum meruit*; or provide the petitioner with such other relief as is fair and just in the circumstances of this case.

Respectfully submitted,

Nathaniel Hawthorne
27600 Chagrin Boulevard
Suite 265
Cleveland, OH 44122
(216) 514-3336

Dennis P. Derrick
Counsel of Record
Seven Winthrop St
Essex, MA 01929 (978)
768-6610

(any footnotes trail end of each document)

No. 05-3974, 05-4022
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALPHA TELECOMMUNICATIONS, INC.,
Plaintiff-Appellant,
v.
INTERNATIONAL BUSINESS MACHINES CORPORATION,
Defendant-Appellee.

September 8, 2006, Filed

NOTICE: NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 28(g) LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 28(g) BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

JUDGES: BEFORE: MOORE, CLAY, and GRIFFIN, Circuit Judges.

OPINION BY: CLAY

OPINION: CLAY, Circuit Judge. Plaintiff, Alpha Telecommunications, Inc. ("Alpha"), appeals a July 8, 2005 order of the United States District Court for the Northern District of Ohio, denying Plaintiff's motion for

summary judgment on its breach of contract and quantum meruit action and granting summary judgment *sua sponte* in favor of Defendant, International Business Machines Corp. ("IBM"). IBM cross-appeals the district court's order, arguing that the district court abused its discretion in denying IBM's motion for sanctions under Rule 11. For the reasons set forth below, we AFFIRM the order of the district court.

I.

BACKGROUND

The dispute in this case arises out of a contract between Alpha and IBM, which both parties entered into for the purpose of helping IBM obtain service contracts with schools through the federal E-Rate program.

A. The E-Rate Program

In February 1996, Congress enacted the Telecommunication Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, at revising, among other things, the Universal Service System. E-Rate, Federal Communications Commission, http://www.fcc.gov/learnnet, (last visited May 25, 2001). Prior to 1996, the Universal Service System was a program that set below cost rates for telecommunications services in under-serviced rural and residential areas, and offset the reduced rates by setting above cost rates for telecommunications services in other areas. *Id.* The 1996 amendments expanded the types of discounted services available through the program, as well as the types of customers

eligible for relief. *Id.* In particular, the amendments rendered schools and libraries eligible for discounted rates on telecommunications and internet services. *Id.* The schools and libraries program is commonly referred to as "E-Rate" and is administered by the Universal Service Company ("USAC"), under the direction of the Federal Communications Commission ("FCC"). Overview of the Schools and Libraries Program, USAC, http://www.universalservice.org/sl/about/overview-program.aspx, (last visited May 25, 2006).

In order for a school or library to participate in E-Rate, the school or library must engage in a highly regulated application process. *See id.* First, the school or library must create a "technology plan" and have the plan approved by a certified entity. Step 2: Develop a Technology Plan, USAC, http://www.universalservice.org/sl/applicants/setp02, (last visited May 25, 2006). Next, the school or library must file "Form 470" with the USAC to begin the competitive bidding process. The USAC posts the school or library's request for services online. Step 3: Open a Competitive Bidding Process, USAC, http://www.universalservice.org/sl/applicants/step03, (last visited May 25, 2006). Thereafter, the school or library must wait 28 days before selecting a service provider. *Id.* In selecting a service provider, schools and libraries must make price the primary selection criteria. Step 4: Select the Most Cost-Effective Service Provider, USAC, http://www.universalservice.org/sl/applicants/step04, (last visited May 25, 2006). After selecting a provider, applicants must calculate their discount rate by using "Form 471," and submit Form 471 to the USAC. Step 5:

Calculate the Discount Level, USAC, http://www.universalservice.org/sl/applicants/step05, (last visited May 25, 2006). The USAC will review Form 471 and determine eligibility. Step 7: Submit Application for Support (Form 471), USAC, http://www.universalservice.org/sl/applicants/step07, (last visited May 25, 2006).

B. IBM's Contract with Alpha

On May 25, 1999, IBM and Alpha entered into a CSA, which was to govern the terms of their relationship. The CSA specified that Alpha would provide "deliverables" and "services" to IBM and that such "deliverables" and "services" would be defined in a future SOW. The CSA also contained termination provisions both for the CSA itself and SOW or Work Authorizations ("WA"). The CSA's termination provision for SOWs reads as follows:

> *3.3 Termination of a SOW or WA*
>
> [IBM] may terminate a SOW or WA with Cause effective immediately or without Cause on sixty (60) days written notice. Upon termination, in accordance with [IBM]'s written direction, [Alpha] will immediately: (I) cease work; (ii) prepare and submit to [IBM] an itemization of all completed and partially completed Deliverables and Services; (iii) deliver to [IBM] Deliverables satisfactorily completed up to the date of termination at the agreed upon Prices in the relevant SOW; and (iv) deliver upon request any work in progress. In the event [IBM] terminates without Cause, [IBM] will compensate [Alpha]

> for the actual and reasonable expenses incurred by [Alpha] for work in process up to and including the date of termination provided [Alpha] uses reasonable efforts to mitigate [IBM]'s liability under this Subsection by, among other actions, accepting the return of, returning to its suppliers, selling to others, or otherwise using the canceled Deliverables (including raw materials or work in process) provided such expenses do not exceed the Prices.

(J.A. at 63.)

The particular SOW at issue in this case was entered into on January 7, 2002. The SOW specified that Alpha would help IBM prepare bids on request for services from school districts in IBM's Western and Southwestern regions. In particular it specified that Alpha would review school districts' requests and determine the applicable rates and discounts under the E-Rate program allowing IBM to properly price its bids. The SOW further specified an estimated schedule for Alpha's work, stating:

> 1.5 Estimated Schedule
>
> Alpha Telecommunications, Inc., will perform services in this Statement of Work as required to meet customer requirements. For this Statement of Work the Start Date will be December 1, 2001, and the Termination Date shall be December 1, 2003.

(J.A. at 17-18.)

Finally, the SOW sets forth fees. The fees provision provided that Alpha would be entitled to a percentage of IBM's fees from the school districts provided those districts were funded by the School and Libraries Division ("SLD") of the USAC. The payment schedule includes the following statements reiterating the conditional nature of Alpha's entitlement to payment: (1) "Total fees wills will apply only to school districts which are funded by the Schools & Libraries Division (SLD)," and (2) "If portions of the [SOW] are not funded or cannot be completed due to delayed release of funds, Alpha Telecommunications , Inc. [sic] payment will be delayed until funding occurs or reduced accordingly." (J.A. at 18.) Finally, the Key Assumptions section of the SOW also states that the SOW is "contingent on funding confirmation from the Schools and Libraries Division (SLD) of the [USAC]." (J.A. at 16.)

C. The Dispute

Alpha started work under the SOW in January 2002. Alpha's work consisted of assisting IBM in preparing bids on request for services for the following sixteen school districts: Albuquerque; Boor Hill; Canntillo; Clint; Dallas; Donna; El Paso; Forth Worth; Galena Park; Gallup; Houston; NETC; New Orleans; Oakland; OK City; and Ysleta. In particular, Alpha would review the districts' request forms (Form 470) and applications for funding (Form 471) and determine which services were eligible for funding. It is unclear from the record which of these school districts subsequently accepted IBM's bids and applied to the SLD for funding. It is clear, however, that the SLD denied funding to all of the districts that applied. *See In re Request for Review*

of the Decision of the Universal Service Administrator by Ysleta Independent School District, 18 F.C.C.R. 26406 (2003). The districts and IBM appealed the denials to the FCC. *Id.* On December 8, 2003, the FCC issued an order affirming the SLD's denial of funding. *Id.*

On February 25, 2004, IBM employee, Mike Pratt, called Alpha's attorney, Nathaniel Hawthorne, and informed Hawthorne that the SOW had expired at the end of December 2003 and that IBM would not be renewing it. In response, Alpha sent IBM an invoice for $ 16,135,053.97 for worked performed under the SOW. Alpha allegedly performed 90% of the work called for the SOW. IBM refused to pay on the ground that SLD had not approved the funding, and therefore, IBM did not owe Alpha any fees under the SOW.

On March 11, 2004, Alpha filed suit in federal district court, alleging that IBM breached the CSA by terminating the SOW without cause. IBM denied that it terminated the SOW, and argued that the SOW expired on December 1, 2003, as set forth in the SOW's estimated schedule. Additionally, IBM moved for sanction under Rule 11 on the ground that even if it had breached the SOW, Alpha was not entitled to damages under the SOW and thus Alpha's suit was frivolous. In response, Alpha argues that the SOW did not expire because the FCC extended the SLD's funding period for E-Rate grants, or "project year," from December 8, 2003 until April 23, 2004. Alpha contends that the FCC's extension of the funding period altered the SOW's termination date.

The district court assumed that IBM had terminated

the SOW for the purposes of this action and granted summary judgment in favor of IBM on the ground that Alpha had not demonstrated it was entitled to damages under the SOW. According to the district court, SLD funding was a condition precedent to payment under the SOW, and IBM never received such funding. Alpha appeals this determination, arguing that the district court misconstrued its claim; Alpha states that it is not claiming the right to payment under the SOW but damages under the CSA for IBM's without-cause-termination of the SOW. IBM cross appeals the district court's order denying Rule 11 sanctions.

II.

DISCUSSION

A. Summary Judgment

1. Standard of Review

This appeal arises both in the context of a grant of summary judgment in favor of IBM and a denial of a motion for summary judgment in favor of Alpha. A district court's decision to grant summary judgment is reviewed *de novo*, whereas a district court's decision to deny summary judgment is reviewed for abuse of discretion. *Wojcik v. City of Romulus*, 257 F.3d 600, 608 (6th Cir. 2001). In this case, the differing standards of review are not dispositive to our resolution of the issues before us because the issues in this appeal are purely legal, contract interpretation. *See GenCorp Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 817-18 (6th Cir. 1999) (insurance contract). Inasmuch as a district court has no discretion to grant summary judgment on the basis of

an incorrect interpretation of law, *see In re Brown*, 342 F.3d 620, 633 (6th Cir. 2003) (citation omitted), we review all the issues in this case *de novo*.

2. Analysis

To prevail on a breach of contract claim under Ohio law, a plaintiff must establish the following four elements: (1) the existence of a contract; (2) performance by the plaintiff; (3) a breach by the defendant; and (4) damage or loss to the plaintiff. *Doner v. Snapp*, 98 Ohio App. 3d 597, 649 N.E.2d 42, 44 (Ohio App. 1994). The district court granted summary judgment in favor of IBM and denied summary judgment in favor of Alpha on the ground that Alpha had failed to establish any entitlement to damages under the contract. Although we disagree with the district court's holding on damages, we nonetheless affirm the order of the district court on the ground that Alpha failed to establish that IBM breached the contract in question.

a. Damages

The CSA expressly requires IBM to compensate Alpha for work completed under an SOW when IBM terminates a SOW without cause. It states:

> In the event [IBM] terminates without Cause, [IBM] will compensate [Alpha] for the actual and reasonable expenses incurred by [Alpha] for work in process up to and including the date of termination provided [Alpha] uses reasonable efforts to mitigate [IBM]'s liability under this Subsection by, among other actions, accepting the return of, returning to its suppliers, selling to

> others, or otherwise using the canceled Deliverables (including raw materials or work in process) and provided such expenses do not exceed the Prices.

(J.A. at 63). Thus, Alpha is clearly entitled to be compensated for its work in the event of a breach.

The fact that Alpha's entitlement to payment under the SOW is conditioned on IBM's receipt of SLD funding does not render Alpha's right to damages in the event of breach conditional on such funding. The district court's conclusion to the contrary, which is adopted by the concurrence, misconceives the nature of conditions precedent. Conditions precedent render a party's performance conditional; conditions precedent do not grant a party the right to repudiate a contract prior to the occurrence of the condition. *Corbin on Contracts* § 959 (interim ed. 2002) (discussing anticipatory repudiation). When a party repudiates a contract before the occurrence of a condition precedent to the party's performance, the adverse party may "treat the entire contract as broken and sue for breach of contract, and there is no necessity in such cases for . . . compliance with conditions precedent." *Livi Steel, Inc. v. Bank One, Youngstown, N.A.*, 65 Ohio App. 3d 581, 584 N.E.2d 1267, 1270 (Ohio App. 1989); *see also Corbin on Contracts* § 959 ("It is now the generally prevailing rule in both England and the United States that a definite and unconditional repudiation of the contract by a party thereto, communicated to the other, is a breach of the contract, creating an immediate right of action and other legal effects, even though it takes place long before the time prescribed for the promised performance and before conditions specified in the

promise have ever occurred"). In this case, Alpha argues that IBM repudiated the SOW prior to the occurrence of the relevant condition -- SLD funding -- and accordingly, Alpha need not establish that condition precedent contained in the SOW has occurred. *Id.* Although, as will be discussed in the next section, Alpha's contention that IBM repudiated the contract is incorrect, if IBM had repudiated the contract, the traditional principles of contract law espoused by Ohio would entitle Alpha to damages.

Similarly, IBM's argument that the *CSA itself* limits Alpha's recovery is incorrect. According to IBM, the CSA limits Alpha's right to recovery in the event of breach by limiting damages to the "Prices" set forth in the SOW. IBM interprets the SOW to set the "Price" at 0 in the event that IBM does not receive SLD funding. As IBM never received SLD funding, it contends that the CSA entitles Alpha's to "0" damages. The problem with IBM's argument, however, is that it confuses the concept of Price with the concept of right to payment. The prices set forth in the SOW are the actual numerical values attached to Alpha's work--in this case 7%-10% of various contracts -- whereas SLD funding is a condition precedent to payment, not a part of the "Price."

To interpret "Price" otherwise would render the SOW termination clause set forth in the CSA meaningless. The CSA damages provision contemplates IBM terminating an SOW before the parties complete their performance under the contract, and conceivably before conditions precedent to payment are fulfilled. In fact, the entire purpose of the CSA damages provision is to compensate parties in such cases. Thus, to hold that

despite IBM's termination without cause, Alpha is not entitled to damages would be illogical.

b. Breach

Nonetheless, Alpha is not entitled to damages under the CSA's damages provisions because IBM did not repudiate the SOW in issue. Alpha alleges that IBM's February 25, 2004 phone call, in which Mike Pratt instructed Alpha to stop work under the SOW, constituted an anticipatory repudiation of the terms of the SOW. At the time of the phone call, however, the SOW had already expired according to its own terms on December 1, 2003. The SOW reads:

> 1.5 Estimated Schedule
>
> Alpha Telecommunications, Inc., will perform services in this Statement of Work as required to meet customer requirements. For this Statement of Work the Start Date will be December 1, 2001, and the *Termination Date shall be December 1, 2003.*

(J.A. at 18 (emphasis added).) Consequently, in February 2004, the SOW had already expired, and IBM could not have repudiated or terminated the SOW.

Alpha's contention that the SOW did not terminate of its own accord on December 1, 2003 because the termination deadline was extended is meritless. According to Alpha, the FCC's December 8, 2003 order altered the actual termination date by extending the regulatory funding year for E-Rate contracts ("project year"). As proof of its position, Alpha submits evidence

that Alpha and IBM entered into another SOW, the Syracuse SOW, and the Syracuse SOW has not yet been terminated, ostensibly due to the FCC's order.

There are numerous problems with Alpha's argument. First, the FCC's alteration of its project year is irrelevant to the SOW's termination date. A project year is simply the year which a school's plan must cover, and for which time period the FCC will supply a school with funding. Its dates do not correspond with any agreement between Alpha and IBM. As IBM correctly notes, the SOW does not state that its termination date is based on the FCC's project year, and Alpha fails to explain why the dates of the project year would have any bearing on the SOW's termination date. Notably, the original project year dates never matched the termination date, making any inference that the dates needed to correspond untenable. Second, the Syracuse SOW is not comparable to the SOW at issue in this case. The Syracuse SOW does not state a termination date. Therefore, to argue that because the Syracuse SOW has not terminated that this SOW has not terminated makes no sense. Finally, there is no relationship between the FCC's altered project year and the fact that Syracuse SOW has not yet terminated. The FCC's altered project year applied only to a limited number of school districts, those school districts covered by the SOW at issue in this case, but not those covered by the Syracuse SOW. *See In Re Request for Review of the Universal Service Administrator by Ysleta Independent School District*, 18 F.C.C.R. at 26406. Thus, the non-termination of the Syracuse SOW does not indicate that the FCC's order altered any termination date.

The only plausible argument that supports Alpha's position that the December 1, 2003 termination date was only an "estimated" termination date is the heading of the termination clause itself. The heading reads "Estimated Schedule." (J.A. at 18.) One could infer from the heading that the termination date itself, which was a part of the schedule, was also estimated.

Despite the plausibility of this interpretation, however, we nonetheless hold that the SOW expired on December 1, 2003. Assuming that the December 1, 2003 was an "estimate" and therefore subject to change, Alpha has offered this Court no reason to believe the date was actually changed. As explained above, Alpha's theory that the FCC order altered the date is without merit. Inasmuch as Alpha offers no evidence that December 1, 2003 was not the termination date, there is no reason for this Court to assume that it was not.

B. Sanctions

1. Standard of Review

This Court reviews a district court order denying sanctions under Rule 11 for abuse of discretion. *Andretti v. Borla Performance Indus., Inc.*, 426 F.3d 824, 833 (6th Cir. 2005). "A court necessarily abuses its discretion if it bases its ruling on an erroneous view of the law or a clearly erroneous assessment of the evidence." *Ridder v. City of Springfield*, 109 F.3d 288, 293 (6th Cir. 1997) (citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990)).

2. Analysis

IBM filed a motion for sanctions alleging that Alpha violated Rule 11 by: (1) filing an objectively meritless complaint; (2) moving for summary judgment; and (3) selectively quoting passages from the contract to the district court. The district court denied the motion, finding Alpha's conduct was not objectively unreasonable because the SOW termination date was not clear from the face of the SOW. On appeal, IBM argues that the district court abused its discretion in denying the motion because, according to the plain language of both contracts, Alpha was not entitled to damages regardless of whether IBM terminated the agreement. Additionally, IBM argues that the district court abused its discretion in failing to consider that Alpha had selectively quoted from the contract.

Section (b) of Rule 11 prohibits attorneys from filing any "pleading, written motion, or other paper," unless "to the best of that attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." Fed R. Civ. P. 11(b). In this Circuit, the test for whether sanctions under Rule 11 are warranted is whether the conduct for which sanctions are sought was "reasonable under the circumstances." *Ridder v. City of Springfield*, 109 F.3d 288, 293 (6th Cir. 1997); *Runfola & Assocs. v. Spectrum Reporting II*, 88 F.3d 368, 372 (6th Cir. 1996). The district court exercises wide discretion in determining whether an attorney's conduct is reasonable. *Id.*

The district court did not abuse its discretion in denying IBM's motion for sanctions pursuant to Rule 11. The termination date set forth in the SOW arguably was ambiguous. As discussed above, the clause's heading stated "Estimated Schedule," thereby allowing the inference that the termination date listed below was also estimated. Accordingly, the district court's determination that Alpha's position was not objectively unreasonable was within its discretion.

Furthermore, we decline to hold that IBM's remaining arguments merit a contrary result. First, IBM's primary argument -- that the ambiguity of the termination clause is irrelevant because Alpha was not entitled to damages regardless of whether IBM terminated the contract -- is incorrect as a matter of law as discussed in the previous section. Next, IBM's second argument -- that Alpha selectively quoted passages -- is waived. IBM failed to point to any specific instances in which Alpha selectively quoted passages. In addition to having a duty to develop arguments, *see United States v. Layne*, 192 F.3d 556, 566 (6th Cir. 1997), IBM has a duty to cite to the record in its brief on appeal, Fed. R. App. P. 28. Inasmuch as IBM has done neither with regard to its second argument, we deem this argument waived. *See Bush v. Dictaphone Corp.*, 161 F.3d 363, 366 (6th Cir. 1998); *Layne*, 192 F.3d at 566. Consequently, we hold that the district court did not abuse its discretion in denying IBM's motion for Rule 11 sanctions and affirm the district court's order.

III.

CONCLUSION

For the reasons set forth above, we AFFIRM the order of the district court.

CONCUR BY: GRIFFIN

CONCUR: GRIFFIN, Circuit Judge, concurring.

I concur in the result reached by the majority, but would do so for the reasons set forth by the district court. The district court found dispositive the section of the SOW entitled "Key Assumptions," and I agree. The relevant "Key Assumptions" provide:

> 2. This Statement of Work is contingent on funding confirmation from the Schools and Libraries Division (SLD) of the Universal Service Administrative Corporation. Funding confirmation shall occur when the SLD posts funding on the SLD website.
>
> 3. Alpha Telecommunications, Inc. will receive payment from IBM for services provided pursuant to the appropriate SOW . . . upon IBM [sic] receipt of payment from the federal government.

The district court interpreted these "Key Assumptions" as conditions precedent to the performance of IBM's payment obligations, and I find no reason to disturb that holding. Ohio law requires that "[a]n entire contract must be considered when determining whether a condition precedent exists." *Kaufman v. Byers*, 159 Ohio App. 3d 238, 2004 Ohio 6346, 823 N.E.2d 530, 537 (Ohio App. 2004) (citations omitted). Generally, whether a particular provision is a condition

precedent "is a question of intent; and the intention will be ascertained by considering the language not only of the particular provision, but of the whole contract and its subject-matter." *Id.* (citation omitted). Here, the SOW unambiguously provides that the SOW was contingent upon SLD funding, that Alpha was only entitled to payment after IBM's receipt of federal funds, and Alpha's payment (if any) was based on a percentage of the federal funds that IBM received.

Alpha's remaining arguments--that the FCC's ruling modified the time period of the SOW and that IBM breached the contract before the condition precedent could occur--are equally without merit. First, as IBM points out, the district court's grant of summary judgment was entirely based on the failure of a condition precedent; therefore, it is irrelevant whether the FCC ruling extended the contract window. Most importantly, Alpha has not alleged that the condition precedent -- that the school districts and, in turn, IBM, would receive federal funding -- did occur, or would have occurred, within the extended time period. Notably, the applications for federal funding were submitted by the *school districts*, not IBM. Thus, even if Alpha were alleging a frustration-of-purpose defense to execution of the condition precedent, the school districts were responsible for submitting new bids, not IBM. To this effect, five of the school districts did submit new bids, yet, nevertheless, IBM did not receive any federal funds. Alpha has not alleged any evidence to the contrary, but merely contends that the CSA provision controls the contract's termination.

For these reasons, I would affirm the ruling of the district court with respect to Alpha's breach of contract

claims. I join in Section II.B. of the majority opinion affirming the district court's order denying sanctions.

Filed: 7/8/05
CASE NO. 1:04 CV 489
IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ALPHA TELECOMMUNICATIONS, INC.
Plaintiff

-vs

INTERNATIONAL BUSINESS MACHINES CORPORATION
Defendant

MEMORANDUM OF OPINION AND ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S MOTION FOR SANCTIONS AND GRANTING SUMMARY JUDGMENT FOR THE DEFENDANT

UNITED STATES DISTRICT JUDGE LESLEY WELLS

Before this Court is Plaintiff Alpha Telecommunications, Inc.'s ("Alpha") motion for summary judgment on its breach of contract action against Defendant International Business Machines Corporation ("IBM"). (Docket #7 and #1). IBM filed a Brief in Opposition, (Docket #9), and Alpha filed a response to that Brief. (Docket #13). Also before the Court is IBM's motion for sanctions pursuant to Fed. R. Civ. P. 11. (Docket #8). Alpha filed a memorandum contra, (Docket #12), to which IBM replied. (Docket #14). For the reasons set forth below, Alpha's motion

for summary judgment is denied, and summary judgment is granted on behalf of IBM.

I. BACKGROUND

On 25 May 1999, Alpha and IBM bound themselves to a "Customer Solutions Agreement" ("CSA"), which set forth the procedures governing their business relationship and envisioned future specific Statements of Work ("SOW'), wherein Alpha would provide consulting services to IBM. (Docket #7, Ex. D). Alpha entered into one such SOW on 7 January 2002 with IBM. (Docket #1 at T 2). Under the terms of that SOW, Alpha's obligations required it to: "work with IBM in evaluating E-Rate forms 470' and 471[2] in the Western and Southwestern Regions.[3] This includes consulting with IBM on E-Rate eligibility of all services and products to be provided in the Western and Southwestern Regions. Alpha Telecommunications will also counsel on E-Rate rules and regulations." (Docket #7, Ex. A at 3, ¶1.2.1). In return, IBM would pay Alpha "seven percent (7%) of the total value of the IBM SOWs including services and products will apply [sic] to school districts in the Western and Southwestern Regions ... [plus] Ten percent (10%) of the IBM SOWs with school districts within the Western and Southwestern Regions ... requiring bidding of hardware products." (Docket #7, Ex. A at 4, Appx. A).

Additionally, the parties agreed to several "Key Assumptions" listed in the 7 January 2002 SOW. (Docket #7, Ex. A at 2, ¶ 1.1). The only Key Assumption put at issue by Plaintiff's complaint reads:

2. This Statement of Work is contingent on

> funding confirmation from the Schools and Libraries Division (SLD) of the Universal Service Administrative Corporation. Funding confirmation shall occur when the SLD posts funding on the SLD web site.

(Docket #7, Ex. A at 2, ¶ 1.1). Work allegedly proceeded on the contract, and Alpha claims it "performed ninety percent (90%) of the work required under this SOW; [sic] and was prepared to complete the remaining ten percent (10%), but for the SOW termination by IBM." (Docket #7, Ex. E at ¶ 5). Bids were submitted for the school districts listed in Appendix C of the SOW, (Docket #7, Ex. A at 7, Appx. C), and were denied by the Schools and Libraries Division of the Universal Services Administration Corporation on 3 December 2002, (Docket #11 at 3, ¶ 1, n. 3), with the exception of Gallup-McKinley Public Schools, which (so far as this Court can tell from the evidence presented) is still pending as of 30 April 2004. (Docket #9 Ex. A at 2, ¶ 9).

IBM and the affected school districts appealed the Schools and Libraries Division's order to the FCC, as allowed by 47 C.F.R. § 54.719(c). FCC Secretary Marlene Dortch issued Order #03-313 on 8 December 2003, affirming the Schools and Libraries Division's decision to deny funding to the school districts and thus to IBM. However, the Secretary re-opened the submission window for that funding year for an additional sixty (60) days for Form 470, and until 23 April 2004 for Form 471, noting:

> [W]e will rarely find good cause to grant a waiver of our rules based on confusion among applicants in applying them ... [but], we find that

> it is in the public interest to grant a waiver of our rules in the novel situation posed by the instant case.
>
> We therefore direct the Administrator to re-open the Funding Year 2002 filing window for all of the applicants set forth in the caption. Applicants will have *sixty days from the date of the release of this Order* to resubmit their FCC Forms 470.
>
> In all cases, the applicants must file their completed FCC Forms 471 on or before 23 April 2004.

(Docket #11 at 33-34, ¶¶ 73-74) (emphasis added). Order #03-313 was released on 8 December 2003. Accordingly, the resubmission window closed on 6 February 2004 for Form 470, and on 23 April 2004 for Form 471. Of the school districts denied funding, IBM pursued a contract with only one, and its resubmission was subsequently denied. (Docket #8, Ex. A at 4 ¶ 12).

Alpha contends that on 25 February 2004, IBM breached the contract in a phone conversation notifying Alpha that the contract had expired and that there was "no room" in the contract to include the plaintiff. (Docket #1 at 2, ¶ 4). In what it deems an "invoice statement" to IBM, Alpha calculated its damages to be $16,135,053.97, and when IBM refused to pay this amount, Alpha brought suit in this Court, under Breach of Contract and Quantum Meruit theories. (Docket #1 at 2, ¶ 10). IBM filed a motion for Fed. R. Civ. P. Rule 11 sanctions on 24 May 2004. (Docket #8).

II. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate if the evidence in the record shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party always bears the initial burden of demonstrating the absence of a genuine issue of material fact. Celotex v. Catrett, 477 U.S. 317, 323 (1986). If the motion is properly made and supported as provided in Rule 56(c), the nonmoving party must then "go beyond the pleadings and by her own affidavits, or by the `depositions, answers to interrogatories, and admissions on file,' designate `specific facts showing that there is a genuine issue for trial." Celotex, 477 U.S. at 324. It is not enough for the nonmoving party to point to any alleged factual dispute between the parties. Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 247-48 (1986). To survive summary judgment, the dispute must involve a genuine issue of material fact; that is, a fact that might affect the outcome of the suit under the governing substantive law. Id., 477 U.S. at 248.

Summary judgment is intended as a mechanism for isolating and disposing of "factually unsupported claims or defenses." Celotex, 477 U.S. at 323-24. To that end, the inquiry on summary judgment mirrors the directed verdict standard, and thus a moving party bearing the burden of proof at trial is entitled to judgment as a matter of law when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party;" that is, the movant is required to show that a reasonable jury must find in their favor. Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479-80

(quoting Matsushita Elec. Industrial Co., 475 U.S. 574, 587 (1986)). In considering a motion for summary judgment, the evidence must be viewed in the light most favorable to the party opposing the motion. Matsushita, 475 U.S. at 587.

In the Sixth Circuit, summary judgment may be entered on behalf of the defendant sua sponte, so long as the losing party "[was] on sufficient notice that [they] had to come forward with all of [their] evidence," summary judgment may be entered on behalf of a non moving party. Grand Rapids Plastics, Inc. v. Lakian, 188 F.3d 401, 407 (6th Cir. 1999) (citing Celotex, 477 U.S. at 326); see also Williams v. Int'l Paper Co., 227 F.3d 706, 716 n. 6 (6th Cir. 2000).

III. LAW AND ANALYSIS

A. Governing Law

Ohio law, which controls substantive issues in diversity contract cases such as this one, William C. Roney & Co. v. Federal Ins. Co., 674 F.2d 587, 589 (6th Cir. 1982), prescribes the elements of a successful breach of contract action:

> Those elements include [1] the existence of a contract, [2] performance by the plaintiff, [3] breach by the defendant, and [4] damage or loss to the plaintiff. A claimant seeking to recover for breach of contract must show damage as a result of the breach ... the amount of damages awarded must correspond to injuries resulting from the breach.

Corsaro v. ARC Westlake Vill., Inc., 2005 Ohio App. LEXIS 1908, *8 (2005). Further, all conditions precedent must be fulfilled before the promises in a contract may be enforced. State ex rel. Attorney-General v. McDaniel, 22 Ohio St. 354, 366 (1872).

In a dispute over the meaning of provisions in a contract, courts follow a two-step inquiry. They first must determine whether the contested terms are ambiguous; i.e., if they are susceptible to two or more reasonable interpretations. Csulik v. Nationwide Mut. Ins., 88 Ohio St. 3d 17 (2000). Ambiguity is a question of law. Oak Rubber Co. v. Bank One, N.A., 214 F.Supp.2d 820 (N.D. Ohio 2002). If only one interpretation is reasonably possible, the language is legally unambiguous, and courts must enforce it as written. Foster Wheeler Enviresponse, Inc. v. Franklin County Convention Facilities Authority, 78 Ohio St. 3d 353 (1997). Courts must do so even if the plain and unambiguous language works a hardship on one of the parties or highlights the improvidence of the agreement. Ullman v. May, 147 Ohio St. 468 (1947). If more than one interpretation is reasonably possible, courts must construe the language to effectuate the intent of the parties, and will favor a reading that is equitable, customary, and to which reasonable men would assent. Graham v. Drydock Coal Co., 76 Ohio St. 3d 311 (1996).

B. Analysis

1. Breach of Contract

Neither of the parties raise any issues over the formation of Alpha's contract with IBM. The disputes

salient to the motion for summary judgment center on whether Alpha has performed as required, whether IBM has breached the agreement, and whether Alpha has sustained any recoverable damages.

As an initial matter, this Court agrees with Alpha, and finds that there are no outstanding issues of material fact that would require trial to be resolved [4] In cases postured as this one is, Sixth Circuit courts can decide which of the parties is entitled to judgment as a matter of law. Lakian, 188 F.3d at 407.

Alpha must prove that it is entitled to judgment as a matter of law, even when all available evidence is viewed in the light most favorable to IBM. Matsushita, 475 U.S. at 587. Alpha is not so entitled unless they prove the elements of a "breach of contract" cause of action. Again, if Alpha is not entitled to judgment as a matter of law on even one element of their breach of contract claim, granting summary judgment in their favor is improper.

Even conceding the first three elements on Alpha's behalf, Alpha has failed to show any damages to which it is entitled flowing from IBM's breach. In order to show recoverable damages, Alpha must prove, by a preponderance of the evidence, all conditions precedent to recovery have been fulfilled. Corsaro, 2005 Ohio App. LEXIS 1908 at *8; McDaniel, 22 Ohio St. at 366. In this instance, Key Assumption #2[5], detailed in the 7 January 2002 SOW, clearly operates as a condition precedent to Alpha's recovery. Alpha offers no evidence to show that IBM has received federal E-Rate funding, instead adopting the position that this "key" assumption is, in fact, irrelevant. (Docket #8, Ex. C at 3 ¶ 19).

The Court's conclusion that no recoverable damages have been proven stands even if this Court agrees with Alpha's erroneous interpretation that "[t]here is no termination date per se in either the contract (Complaint) [sic], or the Customer Solutions Agreement," (Docket #7 at 5 ¶ 7), and that FCC Order 03-313, (Docket #11), tolled the termination of the contract.[6]

Because of Alpha's complete failure of proof on an essential element of its claim, this Court's inquiry is at an end.[7] Here, the governing substantive law would require a reasonable jury to find for IBM. Street, 886 F.2d at 1479-1480. As such, summary judgment is granted for IBM as to Count I.

2. Quantum Meruit

Second, Alpha claims IBM has unjustly enriched itself to Alpha's detriment. A fundamental principle of contract law is that quasi-contractual recovery is improper only when there is a valid written contract between the parties. Hughes v. Oberholtzer, 162 Ohio St. 330, 335 (1954). Neither party disputes that an express contract, whatever its terms, was formed by the parties. Although Alpha is permitted to plead causes of action in the alternative, Fed. R. Civ. P. 8(e)(2), it has failed to allege any defect, including bad faith, in the formation of the express agreement with IBM.

Because there is no genuine issue of material fact, this Court must decide which party is entitled to judgment as a matter of law. Lakian, 188 F.3d at 407. Here, the governing substantive law clearly would

require a reasonable jury to find for IBM. Street, 886 F.2d at 1479-1480. As such, summary judgment is granted for IBM as to Count 11.[8]

3. Rule 11 Sanctions

IBM asks this Court to impose sanctions pursuant to Fed. R. Civ. P. Rule 11 against Alpha for failing to make a reasonable investigation as to the factual and legal basis of its claims for breach of contract and quantum meruit. (Docket #8).[9]

District courts in the Sixth Circuit have broad latitude in determining whether to grant Rule 11 sanctions. Orlett v. Cincinnati Microwave, Inc., 954 F.2d 414, 419 (6th Cir. 1992) ("[I]n deciding the nature and extent of sanctions to impose, the district court is given wide discretion."). The standard for imposing sanctions is "whether the individual's conduct was reasonable under the circumstances." Tropf v. Fid. Nat'l Title Ins. Co., 289 F.3d 929, 939 (6th Cir. 2002).

Though this Court agrees with IBM that a claim of unjust enrichment cannot coexist with one of breach of contract if no defect in formation of that contract is alleged, this Court also notes that the Federal Rules also require it to construe the pleadings "so as to do substantial justice." Fed. R. Civ. P. 8(f). Rule 8(f) also guides this Court away from imposing sanctions for Alpha's contention that the SOW lacked a termination date, per se. Instead, the Court will construe that allegation as a request for a finding of ambiguity as to the contract's end date, one that is not unduly unreasonable. Here, the fundamental purpose of Rule 11 sanctions - deterrence - would not be served by

imposing sanctions on Alpha, and the Court declines to do so. Tropf 289 F.3d at 940.

IV. CONCLUSION

For the foregoing reasons, Plaintiff Alpha's motion for summary judgment, and Defendant IBM's motion for Rule 11 Sanctions are both denied, and summary judgment is granted for Defendant IBM.

IT IS SO ORDERED.

[1] Form 470 is submitted by School Districts to the Schools and Libraries Division of the Universal Service Administrative Corporation (an entity under FCC auspices overseeing the distribution of federal monies to selected technology corporations (such as IBM) chosen under the federal E-Rate program (Docket #11 at 2, ¶ 1)), and contains a listing of the services the school district would like to procure, with sufficient specificity to allow potential providers (such as IBM in this case), to bid for the contract when the Form is posted on SLD's website. (Docket #11 at 3, ¶ 2).

[2] Once Form 470 has been posted for four weeks, the applicant school district may select a provider, and then submits a completed Form 471 to the Universal Service Administrative Corporation's Administrator, indicating the selected provider and the discounts being sought. (Docket #11 at 6, ¶ 8).

[3] "Under the E-Rate program . . . School Districts were eligible to receive federal moneys for improving their information technology systems to facilitate access to the internet ... the federal funding was to be provided

annually based on applications filed by the SOW School Districts." (Docket #9, Ex. A at 2, ¶¶ 7-8).

[4] The "issues of fact" raised by IBM, are all either questions of law or require a threshold legal question to be answered before this Court reaches them. (Docket #9 at 10).

[5] "This Statement of Work is contingent on funding confirmation from the Schools and Libraries Division (SLD) of the Universal Service Administrative Corporation. Funding confirmation shall occur when the SLD posts funding on the SLD web site." (Docket #7, Ex. A at 2, ¶ 1.1).

[6] Agreeing with Plaintiff's ill-considered argument would require this Court to first make the legal conclusion that the terms of the contract are ambiguous. Oak Rubber, 214 F.Supp.2d at 820. Language cannot be clearer than that found in ¶ 1.5 of the SOW: "the Termination Date shall be December 1, 2003.," (Docket #7, Ex. A at ¶ 1.5) and, as such, that term must be enforced. Foster Wheeler Enviresponse, 78 Ohio St. 3d at 353.

[7] "[T]he plain language of [Fed. R. Civ. P.] Rule 56(c) mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322.

[8] On both Counts, the grant, sua sponte, of summary judgment on IBM's behalf, is proper because Alpha had sufficient notice that they had to come forward with all

of their evidence. Lakian,188 F.3d at 407. This standard is met here because Alpha, being the Plaintiff, bears the burden of persuasion, and as such is on clear notice that it must adduce all of its evidence if it seeks judgment on its behalf.

[9] IBM complied with Fed. R. Civ. P. Rule 11's "safe harbor" provision by serving Alpha with notice of the motion on 29 April 2004, and filing the motion with the Court on 24 May 2004. (Docket #8 at 13); Fed. R. Civ. P.11(c)(1)(A) (requiring the motion for sanctions to be filed no less than twenty-one (21) days after notice is served upon the opposing party).

No. 05-3974, 05-4022
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALPHA TELECOMMUNICATIONS, INC.,
Plaintiff-Appellant/Cross-Appellee,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Defendant-Appellee/Cross-Appellant.

December 27, 2006, Filed

BEFORE: MOORS, CLAY, and GRIFFIN, Circuit Judges.

The court having received a petition for rehearing en bane, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en bane, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ORDER
ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk,

Filed: 5/24/04
CASE NO. 1:04 CV 489
IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ALPHA TELECOMMUNICATIONS, INC.
Plaintiff

-vs

INTERNATIONAL BUSINESS MACHINES CORPORATION
Defendant

AFFIDAVIT of MICHAEL J. PRATT IN SUPPORT OF DEFENDANT'S MOTION FOR SANCTIONS

JUDGE WELLS
Magistrate Judge Perelman

STATE OF TEXAS COUNTY OF TRAVIS

I, Michael J. Pratt, being first duly sworn, do hereby depose and state as follows: 1. I am an ITS Sector Executive for Education in the IBM Global Services division of International Business Machines Corporation ("IBM"). In that capacity I have developed familiarity with the factual background to the above-captioned litigation.

2. I make the statements herein from my personal knowledge as well as from information provided by individuals with personal knowledge of that information. My address is: IBM, Two Riverway,

Houston, Texas 77056.

3. On or about January 7, 2002, IBM entered into an agreement with Alpha Telecommunications, Inc. ("Plaintiff'). A copy of this agreement is attached to Plaintiffs Complaint in this litigation.

4. The agreement was signed by Nathaniel Hawthorne, on behalf of Plaintiff.

5. Throughout Plaintiff s relationship with IBM, Mr. Hawthorne has been Alpha's principal contact person with respect to the agreements between the parties, and has been the person to whom all IBM's inquiries and concerns were directed with respect to the agreements.

6. Under the agreement, Plaintiff was to assist in preparing bids and applications for E-Rate federal funding for Year 5 of the E-Rate Program, and to assist IBM and certain school districts (the "SOW School Districts") in most effectively pursuing E-Rate Program funding.

7. Under the E-Rate Program, the SOW School Districts were eligible to receive federal moneys for improving their information technology systems to facilitate access to the internet. The program is administered by the Federal Communications Commission ("FCC"), through *the Schools* and Libraries Division ("SLD") of the Universal Services Administrative Company.

8. Under the E-Rate Program, the federal funding was to be provided annually based on applications filed by

the SOW School Districts. Each application was eligible for E-Rate Program funding only for the year in which it was filed.

9. The SLD denied the E-Rate Program funding for every SOW School District that had selected IBM as a vendor, with the exception of one school district's application (Gallup-McKinley Public Schools) which is still pending.

10. Pursuant to an order issued by the FCC on December 8, 2003, the commission determined that the funding applications filed by the following SOW School Districts had been properly denied: Ysleta, Donna, Galena, Oklahoma, City, El Paso, NETC, and Albuquerque.

11. Under the FCC's order, these seven SOW School Districts were eligible to re-apply for funding at a later time. Two of the districts declined to do so.

12. Of the five SOW School Districts re-applying for E-Rate funding, IBM pursued only one contract (that for the NETC school district) during the re-bid process. It is IBM's understanding that its bid was unsuccessful and that it did not receive the NETC contract.

13. For the funding year at issue in this litigation, none of the SOW School Districts have received any federal E-Rate Program funding relative to contracts or applications involving IBM as a potential vendor.

14. IBM therefore has received no federal E-Rate Program funding under the SOW School Districts' federal funding applications filed during the period

covered by Plaintiff s agreement with IBM.

15. Specifically, IBM has received no funding with regard to the E-Rate Program applications filed by the SOW School Districts listed on Plaintiff's February 27, 2004 letter and invoice (El Paso, Ysleta, NETC, Donna, Galena Park, Albuquerque or Oklahoma City). This letter and invoice are attached to Plaintiff's Complaint as Exhibit B.

FURTHER AFFIANT SAYETH NOT.
Michael J. Pratt

RELEVANT PROVISIONS INVOLVED

United States Constitution, Article VI, Paragraph 2:

This Constitution, and the laws of the United States which shall be made in pursuance thereof...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

United States Constitution, Amendment V:

No person shall...be deprived of life, liberty, or property, without due process of law....

47 U.S.C. Section 160:

(a) Regulatory flexibility

Notwithstanding section 332(c)(1)(A) of this title, the [Federal Communications] Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that—

(1) enforcement of such regulation or provision is not necessary to insure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of

consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.

(b) Competitive effect to be weighed

In making the determination under subsection (a)(3) of this section, the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which forbearance will enhance the competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest,

....

(e) State enforcement after commission forbearance

A State commission may not continue to apply or enforce any provision of this chapter that the Commission has determined to forbear from applying under subsection (a) of this section.

47 U.S.C. Sections 251 *et seq.* (The Telecommunications Act of 1996):

Preamble.

To promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies....

47 U.S.C. Sections 254(b)(6) and (h)(1)(b) :

The [Federal State] Joint Board and the [Federal Communications] Commission shall base policies for the preservation and advancement of universal service on the following principles:

....

(6) access to advanced telecommunications services for schools, health care, and libraries— Elementary and secondary school schools and class rooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h).

....

(h) Telecommunications services for certain providers---

(1) In general—

....

(B) Educational Providers and Libraries—All telecommunications carriers serving a geographical area shall, upon a bona fide request for any of its services that are within the definition of universal service under subsection (c)(3), provide such services to elementary schools, secondary schools, and libraries for educational purposes at rates less than the amounts charged for similar services to other parties. The discount shall be an amount that the Commission, with respect to interstate services, and the States, with respect to intrastate services, determine is appropriate and necessary to ensure affordable access to and use of such services by such entities. A telecommunications carrier providing service under this paragraph shall

(1) have an amount equal to the amount of the discount treated as an offset to its obligation to contribute to the mechanisms to preserve and advance universal service, or

(2) notwithstanding the provisions of subsection

(e) of this section, receive reimbursement utilizing the support mechanisms to preserve and advance universal service.

Customer Solutions Agreement ("CSA"), Paragraphs 3.1-3.3:

3.0 Term and Termination

3.1 Term

Deliverables and Services acquired by Buyer or Customer on or after the Effective Date will be covered by this Agreement. This Agreement will remain in effect until terminated.

3.2 Termination of the Agreement

Either party may terminate this Agreement, without any cancellation charge, for a material breach of the Agreement by the other party or if the other party becomes insolvent or files or has filed against it a petition in bankruptcy ("Cause"), to the extent permitted by law. Such termination will be effective at the end of a thirty (30) day written notice period if the Cause remains uncured. Either party may terminate the this Agreement without Cause when there are no outstanding [Statement of Work]s or [Work Authorization]s.

3.3 Termination of a SOW or WA

Buyer may terminate a SOW or a WA with Cause effective immediately or without Cause on sixty (60) days written notice. Upon termination, in accordance with Buyer's written direction, Supplier will immediately:

(i) cease work; (ii) prepare and submit to Buyer an itemization of all completed and partially completed

Deliverables and Services; (iii) deliver to Buyer Deliverables satisfactorily completed up to the date of termination at the agreed upon Prices in the relevant SOW; and (iv) deliver upon request any work in progress. In the event Buyer terminates without Cause, Buyer will compensate Supplier for the actual and reasonable expenses incurred by Supplier for work in process up to and including the date of termination provided Supplier uses reasonable efforts to mitigate Buyer's liability under this Subsection by, among other actions, accepting the return of, returning to its suppliers, selling to others, or otherwise using the cancelled Deliverables (including raw materials or work in process) and provided such expenses do not exceed the Prices.

Statement of Work ("SOW"):

1.1 Key Assumptions

This Statement of Work is based on the Key Assumptions listed below.

....

2. This Statement of Work is contingent on funding confirmation from the Schools and Libraries Division (SLD) of the Universal Service Administrative Corporation. Funding confirmation shall occur when the SLD posts funding on the SLD web site.

3. Alpha Telecommunications, Inc. will receive payment from IBM for services provided pursuant to the appropriate SOW concerning a specific school district or consortium upon IBM['s] receipt of payment from the federal government. Alpha Telecommunications, Inc. will invoice IBM for the

amount(s) due. After IBM has submitted invoicing to the SLD, Alpha will submit its invoice. IBM shall thereafter pay Alpha Telecommunications, Inc. within forty-five (45) business days after invoice.

1.3.1 Project Overview

....

Alpha Telecommunications, Inc. will provide consultation services to IBM throughout the project (Project Year: July 1, 2002—June 30, 2003) on E-Rate, and related issues, brought forward by the SLD, IBM and school districts in the Western and Southwestern Regions.

....

1.5 Estimated Schedule

Alpha Telecommunications, Inc. will perform services in this Statement of Work as required to meet customer requirements. For this Statement of Work the Start Date will be December 1, 2001, and the Termination Date shall be December 1, 2003.

Appendix A. Payment Schedule

....

.... If portions of the Statements of Work are not funded or cannot be completed due to delayed release of the funds, Alpha Telecommunications, Inc. Payment will be delayed until funding occurs or reduced accordingly.

....Total Fees (regarding both 7% and 10%) will apply only to school districts which are funded by the Schools & Libraries Division(SLD)....

53

(2)

Supreme Court, U.S.
FILED
APR 27 2007
OFFICE OF THE CLERK

No. 06-1304

IN THE

Supreme Court of the United States

ALPHA TELECOMMUNICATIONS, INC., PETITIONER

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

JOSE C. FELICIANO
Counsel of Record
THOMAS D. WARREN
Baker & Hostetler LLP
3200 National City Center
1900 East Ninth Street
Cleveland, OH 44114-3485
Telephone: (216) 621-0200

Attorneys for Respondent

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 393-4141 ♦ USSCINFO.COM

QUESTIONS PRESENTED

Did petitioner waive a choice-of-law preemption claim when it failed to raise the issue below?

Petitioner identifies no split between the circuit courts on any issue of federal law. The lower courts did not address the issue of preemption because it was raised here for the first time. Should a writ of certiorari be granted to hear this fact-specific dispute?

The Sixth Circuit held that the parties' private contract terminated before the alleged breach. Petitioner does not challenge this holding under Ohio contract law. The Court does not apply preemption to private contracts. Moreover, the termination clause is not dependent on any federal action, and no federal action was directed to the contract. There is no conflict between state and federal law. Does petitioner have a viable preemption claim?

RULE 29.6

Pursuant to this Court's Rule 29.6, respondent states that International Business Machines Corporation has no parent corporation and no publicly traded company owns 10% or more of its stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.6 ii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT OF THE FACTS 1

REASONS FOR DENYING THE WRIT 3

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

AMERICAN AIRLINES, INC. v. WOLENS, 513 U.S. 219 (1995) 5

ARONSON v. QUICK POINT PENCIL CO., 440 U.S. 257 (1979) 5

BANK OF AMERICA NAT. TRUST & SAV. ASSN. v. PARNELL, 352 U.S. 29 (1956) 5

BOYLE v. UNITED TECHNOLOGIES CORP., 487 U.S. 500 (1988) 5

CARPENTERS HEALTH AND WELFARE FUND OF PHILADELPHIA AND VICINITY v. KENNETH R. AMBROSE, INC., 665 F.2D 466 (3D CIR. 1981) 4

DUERINGER v. GENERAL AMERICAN LIFE INSURANCE CO., 842 F.2D 127 (5TH CIR. 1988) 4

EMPIRE HEALTHCHOICE ASSUR., INC. v. MCVEIGH, 126 S. CT. 2121 (2006) 8

GILCHRIST v. SLEMONS IMPORTS, INC., 803 F.2D 1488 (9TH CIR. 1986) 4

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION v. DAVIS, 476 U.S. 380 (1986) 3, 4

MIREE v. DEKALB COUNTY, 433 U.S. 25 (1977) 5, 6

NIXON v. MISSOURI MUNICIPAL LEAGUE, 541 U.S. 125 (2004) 8

PIEKARSKI V. HOME OWNERS SAV. BANK, F.S.B., 956 F.2D 1484 (8TH CIR.), CERT. DENIED, 506 U.S. 872 (1992) 4

RADEMACHER V. COLORADO ASS'N OF SOIL CONSERVATION DISTRICTS MEDICAL BEN. PLAN, 11 F.3D 1567 (10TH CIR. 1993) 4

SAKS V. FRANKLIN COVEY CO., 316 F.3D 337 (2D CIR. 2003) 4

SWEENEY V. WESTVACO CO., 926 F.2D 29 (1ST CIR.), CERT. DENIED, 502 U.S. 899 (1991) 4

UNITED STATES V. KIMBELL FOODS, INC., 440 U.S. 715 (1979) 8

WINSTEAD V. INDIANA INS. CO., 855 F.2D 430 (7TH CIR. 1988), CERT. DENIED, 488 U.S. 1030 (1989) 4

WOLF V. RELIANCE STANDARD LIFE INS. CO., 71 F.3D 444 (1ST CIR. 1995) 4

RULES AND REGULATIONS

47 U.S.C. § 253 8

47 U.S.C. § 253(A) 7, 8

47 U.S.C. § 253(B) 7

47 U.S.C. § 253(D) 7

47 U.S.C. § 254(F) 8

SUPREME COURT RULE 10 9

INTRODUCTION

Petitioner miscasts this case as involving preemption. In truth, this is a straightforward case of contract construction to which Ohio rules of contract interpretation apply. This simple truth was evident to petitioner throughout this litigation. It brought this case in diversity jurisdiction and sought the application of Ohio law. But now, after losing before the district court and the Sixth Circuit, petitioner asks this Court to preempt the terms of the parties' contract with federal law.

This choice-of-law preemption claim is waived. And in any event, petitioner's claim of preemption is off the mark. The state law of contract interpretation allows consideration of any parol evidence, including evidence of a federal action, if a contract is ambiguous. The Sixth Circuit rejected petitioner's claim because of a failure of proof, not because state law failed to properly account for the FCC decision.

Ultimately, because petitioner failed to establish that the FCC's decision had any nexus to the termination date of the parties' contract – something petitioner concedes as a matter of state law – there is no conflict between federal and state law, and preemption does not apply. Moreover, this Court has not applied preemption to contracts between private parties that, as here, do not specifically impinge upon federal interests. Petitioner cannot identify any federal statute, regulation or common law that would justify disregarding the terms of the parties' contract.

STATEMENT OF THE FACTS

Petitioner Alpha Telecommunications and IBM entered into a contract, consisting of a Customer Solutions Agreement, dated May 25, 1999, and a

Statement of Work ("SOW"), dated January 2, 2002, whereby Alpha provided consulting services to IBM. Appendix to Petition For Writ of Certiorari, p. 5a. The Statement of Work stated that "Alpha Telecommunications, Inc. will perform services in this Statement of Work as required to meet customer requirements. For this Statement of Work, the Start Date will be December 1, 2001, and the Termination Date shall be December 1, 2003." *Id.* After December 1, 2003, IBM notified Alpha that it would not renew the contract. *Id.* at 7a.

Certain school district applications for E-Rate funds for the 2002 "project year" were denied. *Id.* On December 8, 2003, the FCC denied an appeal requesting that the FCC reverse the funding denials. *Id.* at 6a. The FCC decision allowed the districts to resubmit applications if they desired. *Id.* at 22a. The ruling did not mention, much less relate to, the parties' contract. *Id.* at 13a.

Alpha brought a breach of contract action against IBM in federal district court, claiming that the FCC's ruling extended the statement of work's termination date. *Id.* at 7a, 28a. Petitioner did not raise a claim of federal preemption. Rather, petitioner brought this claim pursuant to diversity jurisdiction, and sought the application of state law. IBM denied that it had terminated the parties' agreement, and denied any liability on Alpha's claims. *Id.* at 7a.

The district court granted summary judgment to IBM. *Id.* at 30a. It noted that the termination date in the contract was unambiguous, but ultimately granted summary judgment on other grounds. *Id.* at 31a.

The Sixth Circuit affirmed. *Id.* at 17a. It held that the December 1, 2003 termination date in the

statement of work was clear, and to the extent it was arguably ambiguous, Alpha presented no evidence that the date had changed as a result of the FCC's decision. *Id.* at 12a-14a. As the Sixth Circuit held, "the SOW does not state that its termination year is based on the FCC's project year, and Alpha fails to explain why the dates of the project year would have any bearing on the SOW's termination date." *Id.* at 13a. Since "Alpha offer[ed] no evidence that December 1, 2003 was not the termination date," the Sixth Circuit held that the contract expired on that date and Alpha was not entitled to damages for the alleged "termination" of an expired contract. *Id.* at 14a. Alpha did not raise the issue of federal preemption before the Sixth Circuit either.

Alpha requested a rehearing en banc, again failing to raise any issue of preemption. The Sixth Circuit refused to grant rehearing. *Id.* at 33a. This petition followed.

REASONS FOR DENYING THE WRIT

I. PETITIONER WAIVED ANY CLAIM OF PREEMPTION.

Prior to its petition for a writ of certiorari, petitioner never contested the application of Ohio law to this case. Until this point, petitioner has never argued that any federal statute, regulation or common law preempted the application of Ohio law.

There is no dispute that federal jurisdiction over Alpha's claims exists; Alpha filed its complaint in federal court based upon diversity jurisdiction. Accordingly, the petition is based upon a claim of "choice-of-law" preemption, not "choice of jurisdiction" preemption. "Choice-of-law" preemption, if not asserted below, is waived. In *International*

Longshoremen's Association v. Davis, this Court held that preemption issues that dictate the choice of forum are jurisdictional and are non-waivable, but expressly did not extend that ruling to preemption issues affecting the parties' choice of law. *Davis*, 476 U.S. 380, 390-91 & n.9, 398-99 (1986); *see also Sweeney v. Westvaco Co.* 926 F.2d 29, 38 (1st Cir.) (Breyer, C.J.), *cert. denied*, 502 U.S. 899 (1991).

The circuit courts, seizing upon this distinction, have reiterated that where federal preemption affects only the choice of law, the defense is subject to waiver if not timely raised. *See, e.g., Wolf v. Reliance Standard Life Ins. Co.*, 71 F.3d 444, 448-49 (1st Cir. 1995); *Saks v. Franklin Covey Co.*, 316 F.3d 337, 349 (2d Cir. 2003); *Carpenters Health and Welfare Fund of Philadelphia and Vicinity v. Kenneth R. Ambrose, Inc.*, 665 F.2d 466, 469-70 (3d Cir. 1981); *Dueringer v. General American Life Insurance Co.*, 842 F.2d 127, 130 (5th Cir. 1988); *Winstead v. Indiana Ins. Co.*, 855 F.2d 430, 435 (7th Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989); *Piekarski v. Home Owners Sav. Bank, F.S.B.*, 956 F.2d 1484, 1489 (8th Cir.), *cert. denied*, 506 U.S. 872 (1992); *Gilchrist v. Slemons Imports, Inc.*, 803 F.2d 1488, 1497 (9th Cir. 1986); *Rademacher v. Colorado Ass'n of Soil Conservation Districts Medical Ben. Plan*, 11 F.3d 1567, 1572 (10th Cir. 1993).

Because petitioner failed to assert preemption prior to its petition for a writ of certiorari, and as it does not justify its failure to raise this claim earlier, this Court should deem petitioner's preemption claim waived. Petitioner does not dispute the Sixth Circuit's ruling on any other ground. To the contrary, petitioner concedes that to the extent that Ohio principles of contract interpretation apply, the Sixth Circuit's decision was correct. Accordingly, petitioner has no proper basis for seeking review by this Court.

II. THIS IS A STRAIGHTFORWARD CONTRACT CASE THAT DOES NOT IMPLICATE PREEMPTION.

A. PETITIONER DOES NOT CONTEST THE SIXTH'S CIRCUIT'S DECISION UNDER OHIO LAW.

The contract between petitioner and IBM had a termination date of December 1, 2003. The Sixth Circuit, applying Ohio rules of contract interpretation, held that the contract provided that it terminated on December 1, 2003, and further held that petitioner offered no evidence that the parties changed that date. Accordingly, the Sixth Circuit rejected petitioner's claim that IBM breached the contract after December 1, 2003, and upheld the district court's grant of summary judgment.

Petitioner does not dispute that the Sixth Circuit's decision was correct under Ohio law.

B. FEDERAL PREEMPTION DOES NOT APPLY.

Federal preemption has no place in the interpretation of private contracts that do not touch upon the rights or duties of the United States. *See, e.g., American Airlines, Inc. v. Wolens*, 513 U.S. 219, 228-29 (1995) (preemption does not apply to claim of breach of private contract, even in area regulated by Congress); *Boyle v. United Technologies Corp.*, 487 U.S. 500, 506-07 (1988) ("where 'litigation is purely between private parties and does not touch the rights and duties of the United States,' federal law does not govern") (quoting *Bank of America Nat. Trust & Sav. Assn. v. Parnell*, 352 U.S. 29, 33 (1956)); *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979) ("Commercial agreements traditionally are the domain of state law."); *Miree v. DeKalb County*, 433 U.S. 25, 30 (1977) (whether private

parties could sue as third-party beneficiaries to agreement between municipality and FAA was state law question because "the operations of the United States in connection with FAA grants such as these . . . would [not] be burdened" by allowing state law to apply and because "any federal interest in the outcome" was "far too speculative, far too remote a possibility to justify the application of federal law to transactions essentially of local concern").

Such is the case here. Petitioner intimates that the statement of work was an FCC creation or that the FCC somehow referenced it. This is not the case. The statement of work was a private contract between IBM and Alpha. The FCC order on which petitioner relies neither addressed nor affected the parties' contract. Accordingly, this case does not involve federal preemption.

Petitioner alleges that it was "a violation of the Supremacy Clause for the court of appeals to override the FCC's power to affect the parties' agreement about when the SOW was going to end[.]" Petition for Writ of Certiorari, p. 16. But the Sixth Circuit did not "override the FCC's power" to do anything, and the holding was not predicated upon the rejection of any federal law or regulation. Rather, as the Sixth Circuit held, petitioner failed to produce evidence that the FCC's decision had any relationship to the parties' private contract, or bearing upon the termination date set forth in the contract. As the court held, "the SOW does not state that its termination year is based on the FCC's project year, and Alpha fails to explain why the dates of the project year would have any bearing on the SOW's termination date." Appendix to Petition for Writ of Certiorari, p. 13a.

Because petitioner failed to establish a link between the parties' private contract and the FCC's

decision, preemption is a red herring. Ohio rules of contract construction did not bar consideration of the FCC's extension of the funding window for the E-Rate program. To the contrary, the Sixth Circuit specifically considered Alpha's argument that the FCC's decision bore upon the parties' intent to extend the termination date. The Sixth Circuit's rejection of the claim because of petitioner's failure of proof does not mean that state law of contract, as applied by the lower courts, ignores or places insufficient weight upon federal statute or regulation.

Indeed, if petitioner had evidence that the FCC's decision bore upon the contract's termination date, nothing in state law would prohibit review of such evidence, and this evidence would be considered whether or not there was federal preemption. Without that proof, the FCC's decision had no relevance, with or without preemption.

Moreover, to the extent preemption were at play here, petitioner cannot articulate why the termination provision of this contract would be preempted. Preemption would ostensibly be governed by 47 U.S.C. § 253(a), which provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service," and 47 U.S.C. § 253(d), which provides for preemption when a state law or regulation conflicts with section 253(a) (or section 253(b), which is not at issue here).

Petitioner does not explain how the Sixth Circuit's application of Ohio contract law to the contract's termination date prohibited "any entity from providing interstate or intrastate telecommunications service." The Sixth Circuit's decision did not prohibit IBM from providing telecommunications service and

did not prohibit any school district for applying for E-Rate funds, to the extent section 253 applies to the E-Rate program. *See Nixon v. Missouri Municipal League*, 541 U.S. 125, 143 (2004) (restricting scope of preemption under § 253(a) given ambiguous nature of "any entity"). And there is nothing in the record indicating that the FCC's interests were affected by either the parties' contract or by the Sixth Circuit's interpretation of that agreement. Given the absence of any conflict between federal and state law, preemption is unwarranted.

Petitioner alternatively claims field preemption. Petition for Writ of Certiorari, pp. 19-20. But field preemption applies only when Congress makes that "atypical intention clear." *Empire Healthchoice Assur., Inc. v. McVeigh*, 126 S. Ct. 2121, 2135 (2006). Under 47 U.S.C. § 254(f), a state may adopt regulations not inconsistent with FCC's "rules to preserve and advance universal service." *See also Nixon*, 541 U.S. at 143 (rejecting a preemption claim in a section 253 case without alternatively considering field preemption). Moreover, were this Court to apply federal common law, as petitioner requests, this Court presumptively adopts the law of the forum state as federal common law. *See, e.g., Empire Healthchoice*, 126 S. Ct. at 2131-32 (citing *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 740 (1979)). As such, even if federal common law applied, the result would be precisely the same.

At the end of the day, this is a simple case of contract interpretation based upon normal (and universal) principles of contract construction. The IBM-Alpha contract did not state that its termination would be affected by any decision of the FCC, the FCC order did not address or relate to the contract, and the parties did not agree to extend the termination date set

forth in their contract.[1] Petitioner concedes that this evidence, under Ohio law, warranted summary judgment in IBM's favor. Petitioner's last-ditch attempt to do an end run around this decision by claiming federal preemption is off the mark.

III. NONE OF THE TRADITIONAL INDICIA OF CERTWORTHINESS EXIST.

Petitioner fails to satisfy the criteria set forth in Supreme Court Rule 10. Petitioner identifies no split between the circuit courts on an issue of federal law. Indeed, the lower courts did not even rule on any issue of federal law, as petitioner did not raise the issue of preemption before now. Petitioner's request that this Court review this case, when the preemption issue was not presented below and where no circuit split exists, should be rejected.

---

[1] Even had the termination date been extended, payment to petitioner under the contract was contingent upon the school districts receiving funding, which they never did.

BEST AVAILABLE COPY

CONCLUSION

For the reasons set forth herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOSE C. FELICIANO
Counsel of Record
THOMAS D. WARREN
Baker & Hostetler LLP
3200 National City Center
1900 East Ninth Street
Cleveland, OH 44114-3485
Telephone: (216) 621-0200
Attorneys for Respondent